United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1178

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1178

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK CLARK, III,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. HEMLEY,
FREDERICK T. DAVIS,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

Table of Cases

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1178

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK CLARK, III,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Clark, III, appeals from a judgment of conviction entered on April 3, 1975, in the United States District Court for the Southern District of New York after a three day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 74 Cr. 914, filed September 26, 1974, charged in one count that Clark knowingly transported a stolen diamond, valued at more than $5,000, in interstate commerce from West Dover, Vermont to New York, New York, in violation of Title 18, United States Code Section 2314.

Trial commenced on February 18, 1975, and concluded with a verdict of guilty on February 20, 1975. On April 3, 1975, Clark was sentenced to a term of six months imprisonment, execution of which was suspended, and a committed fine of $7,500 was imposed. The payment of

the fine has been stayed pending the outcome of this appeal. Clark, an attorney duly admitted to the Bar of the State of Florida, continues to practice law at the present time.

Statement of Facts

The Government's Case

On November 3, 1971, U. Doppelt & Co., diamond merchants located at 580 Fifth Avenue, New York, New York, consigned an 8.05 carat diamond ring of a stated wholesale value of $39,000 and a retail price of $62,500, to the Neiman-Marcus department store in Dallas, Texas (Tr. 62-66, 206-207; GX 1, 6).* Thereafter, until May, 1972, the diamond was at various times returned to U. Doppelt & Co., re-consigned to Neiman-Marcus, and put on display by Neiman-Marcus at its satellite store in Bal Harbour, Florida. On May 8, 1972 the Bal Harbour store returned the diamond to Neiman-Marcus in Dallas. On May 25, 1972, Steven Magner, a Neiman-Marcus salesman, exhibited the diamond to a potential customer in the office of the head of the store's precious jewelry department. After that date the diamond was never seen again by anyone at Neiman-Marcus (Tr. 65-73, 207-208; GX 2-6). When the regular six month inventory was taken by Neiman-Marcus in July 1972, the diamond was reported as missing (Tr. 80-84; GX 8). A thorough search of the records and of the premises was then conducted by the Neiman-Marcus security force and the personnel in the precious jewelry department, with negative results (Tr. 83-85).

Neiman-Marcus exercises extreme caution in safeguarding precious jewelry. All items valued at $25 or more are logged in individually and given an identifying stock number.

---

* "Tr." refers to the trial transcript; "GX" refers to Government exhibits; and "Br." refers to appellant's brief.

In addition to the invoices and receipts that are maintained to detail the movement of such items, a stock sheet is established to record a summary of such movement (Tr. 60). Further special treatment is afforded jewelry worth more than $500. When not on display in a locked showcase, the diamond in this case was kept in either a safe on the sales floor to which only five people had the combination, or in a safe in the office area, to which only three people had the combination. A full-time security investigator was always present in the precious jewelry department when the safes were open. In addition there were elaborate alarm systems attached to the safes and a requirement that at least three persons be present on the sales floor before the safe on that floor was opened (Tr. 73-79). Strict regulations restrict the movement of the jewels out of the store. Only a bonded salesman may take a jewel off the premises for a private exhibition. When he does so he must complete a trip book requiring a description of the merchandise, its number, its price, the date it is being taken out, and the destination. Two other salesmen must then sign off on the trip book before the jewel can actually be taken. As a final precaution, twice a year, in January and July, a complete inventory of all the precious jewelry is taken (Tr. 79-80).

On January 10, 1974, approximately twenty months after the diamond had last been seen at Neiman-Marcus, Frank Clark, III, accompanied by his wife, Lael Clark, and a Mr. & Mrs. Koelsch, went to the offices of L. Bergman, Inc., dealers in precious stones, located at Rockefeller Center in New York City. Clark offered to sell the diamond to the proprietor, Gordon Duffield, for $75,000. Duffield told Clark he would have to send the diamond to the Gemological Institute of America for an appraisal, and gave Clark a receipt for the diamond (Tr. 121-125; GX 13). It was too late in the day, however, to send the diamond to the Institute, so after Clark had left, Duffield

and his partners decided to send it to a diamond cutter to determine if two minor imperfections could be removed. The diamond cutter they chose was U. Doppelt & Co., the firm which had originally consigned the diamond to Neiman-Marcus in 1971. Stanley Doppelt immediately recognized the diamond as the one which was missing from Neiman-Marcus, and the Federal Bureau of Investigation ("FBI") was contacted (Tr. 124-126, 207-209, 205-218).

The following day, January 11, 1974, two agents of the FBI interviewed Clark in the presence of his wife Lael in his hotel room at the Americana Hotel. Clark told the agents that he had acquired the diamond as an engagement present for Lael in the spring of 1972.* Clark further told the agents he had purchased the diamond from his friend William Ruben Turner, a compulsive and successful high stakes gambler, for $15,000 in cash withdrawn from a bank account, and the forgiveness of two debts Turner owed him: a $2,000 loan and $3,000 in legal fees. Clark said that Turner, since deceased, had won the ring in a gambling venture and that he had no documents of title for it (Tr. 141-147, 162, 168, 171-174).

Prior to the interview with the FBI agents in January, 1974, Clark had given three accounts of how and when he acquired the diamond which were at variance with what he told the agents. On May 19, 1972 and on September 21, 1972, Clark testified under oath at a deposition taken in connection with a divorce proceeding then pending between him and his former wife, Stephanie M. Clark. In the first session of the deposition Clark testified in part that as of that date he was virtually without assets. In the second session Clark testified that he had not purchased any diamonds or rings for his fianceé Lael Batchelor, had

---

* In the defense case, Clark and his wife each testified that he acquired the ring in late May, 1972 (Tr. 266, 348-349).

no idea what her rings cost, and had nothing to do with giving them to her (Tr. 199-201, 202-204; GX 15, 16).*

---

* On May 19, 1972, Clark testified:

"Q. Now, do you have any savings accounts? A. No.

Q. Do you have any savings or was any financial institution of any description holding any money for you? A. No, I had some mutual funds, Enterprise, Inc., I believe the name of it was. I sold those some 18 months ago, $1,000, I think I got.

Q. Where did you get the $1,000? A. I paid out of my earnings $2,000 and I never followed through and by that time the mutual fund dropped and I received $1,000 for the $2,000 invested.

Q. Do you have any checking accounts? A. Just at United National Bank, Cocoa Beach.

Q. How much do you have in that account now? A. $109, I think.

Q. What was the highest amount in the last two years? A. Six or $700, I believe.

Q. Do you have any accounts in any financial institutions, whether it be within the states or without the United States? A. No.

Q. Do you have any accounts in Nassau or the Bahamas? A. No.

Q. When I say have accounts, I mean does anyone else maybe have the account in their name but actually you have an interest in the account? A. No, I have no interest.

Q. And you are not holding—your name isn't on any account where you are holding an eqiutable interest for someone else? A. No.

Q. Now, do you have any safety deposit boxes? A. No.

Q. Have you had a safety deposit box or vault or safe or any other place of deposit for safekeeping in the last two or three years? A. I don't think I ever had a safety deposit box.

Q. Do you have at the present time any cash or equivalent to cash? A. Yeah, about $3,000.

Q. Where is this located? A. In cash.

Q. I don't mean the exact spot, apparently it is not in a bank? A. No.

Q. Can you in general describe what city that is in? A. Cocoa Beach.

[Footnote continued on following page]

On October 6, 1973, Clark told Seymour Schultz, a jeweler in Bennington, Vermont, that he had purchased the diamond six or seven years earlier from a salesman for DeBeers Consolidated Mines, Ltd. (Tr. 99-100).*

Q. Is someone holding this money for you? A. No.

Q. Is this just hidden some place else? A. Yes.

Q. Is there any reason why it is not in a safe spot? A. No, just personal preference.

Q. And where did you receive that $3,000? A. Part of the proceeds from the Wilson murder case.

Q. I believe I have already asked are you to receive any more monies from Mrs. Wilson for services you already performed? A. No.

Q. Now, have you owned any other real property other than what we mentioned the last two or three years? A. No, I don't think so.

Q. Then you have not transferred any real property other than what we mentioned during the last two or three years? A. None that I can recall."

In his defense at trial below Clark attempted to explain this testimony by stating he had been transferring all his assets into his financee's name to make himself judgment-proof and to "legally prepare" himself for the deposition (Tr. 275). Clark admitted, however, that he had a power of attorney giving him the right of access to his fiancee's bank accounts, and that in any event no request of his for any of the funds he had transferred into her name was ever denied (Tr. 305-306, 329-331).

On September 21, 1972, Clark testified:

"Q. Did you purchase any diamonds, rings, for Lael Batchelor? A. No.

Q. Have you ever told anyone that you did? A. Oh, I might have, but I didn't. She bought them herself.

Q. You think she might have some rings that you might have said that you purchased for her, but you really didn't; is that correct? A. That's correct, yes.

Q. Those rings have been—approximately what do they cost? A. I don't have any idea; she bought them.

Q. But in any event you had nothing to do with giving them to her? A. That's correct."

In his testimony at the trial below Clark admitted that his answers came "pretty close to skirting the line on truthfulness" (Tr. 277).

* DeBeers Consolidated Mines, Ltd. deals exclusively in raw, unpolished gems and does not have salesmen (Tr. 212-213).

On November 27, 1974, Clark told Tom Sander, a newspaper reporter for the Today newspaper in Titusville, Florida, that collecting rings was a hobby of his and that he "got one that wasn't apparently right" (Tr. 190).

The Defense Case

Clark called two witnesses in his behalf and testified in his own defense.

Clark and his present wife Lael testified that he bought the ring from Turner as an engagement present for Lael when she was his fianceé at the end of May, 1972, agreeing to pay $20,000 and accepting Turner's representation as to its value even though neither Turner nor Clark were experts in diamonds, no appraisal had been made prior to the purchase, and Turner did not have any title papers (Tr. 248-250, 315-316, 318, 323, 348-354). After Clark had agreed to pay Turner $15,000 in cash plus the forgiveness of two debts totaling $5,000, and after Lael had given Turner approximately $2,500 of the purchase price in cash and travelers checks, Clark and Lael went to the Bahamas, where they obtained the remainder of the cash from Lael's bank account into which Clark had been deposting his own money,* and where a jeweler looked at the diamond but did not appraise it (Tr. 250-251, 353-357).** Upon returning to Florida one week later, the remainder of the money owing on the purchase price was given to Turner, and the Clarks then proceeded to Philadelphia, Pennsylvania. In Philadelphia the Clarks had the diamond appraised for insurance

---

* No documentary evidence reflecting this supposed withdrawal of $15,000 in cash was ever produced by Clark or his wife.

** Clark admitted on cross-examination that this was possibly the biggest single purchase other than of a home, that he had ever made (Tr. 334). After denying that the sum of $20,000 was a "substantial" sum of money for him to have spent, Clark admitted that his gross receipts, before taxes, as reflected on his income tax returns for 1970, 1971, and 1972 were $22,000, $23,400, and $16,000, respectively (Tr. 334-338).

purposes by a Mr. Stan Warwick who had "done some work in association with the DeBeers people" (Tr. 251-254, 358-360). Thereafter, they contacted Mead Batchelor, Jr., Lael's step-son and an insurance agent, to explore the possibility of insuring the diamond. The Clarks abandoned the idea of insurance after Batchelor explained the restrictions that the insurance company would insist on (Tr. 255, 406-409). During the next twenty months the Clarks exhibited the ring to jewelers in Vermont, California, Georgia and Boston, finally deciding to sell it in January, 1974 because it had increased in value, they feared for Mrs. Clark's safety, and because there was no insurance. At no time in the twenty months when they had the ring did the Clarks use an assumed name or make any alterations in the diamond or the mounting (Tr. 255-260, 262-268, 360-361, 367).

ARGUMENT

POINT I

There was sufficient evidence to support Clark's conviction.

Clark contends that the evidence against him was insuffiicent to support a finding by the jury that the diamond was stolen rather than lost or misplaced, and that Clark knew the diamond was stolen.

While no direct evidence of the theft of the diamond was introduced, it is clearly established that such proof is not necessary. The circumstances from which the jury might fairly have concluded that the diamond was stolen as distinguished from having accidentally disappeared are substantial: the diamond mysteriously disappeared from Neiman-Marcus where it had been kept under a careful and close watch consistent with the store's security precautions for such valuable merchandise; even on his version of the

facts, Clark paid only $20,000 for the diamond, which had been selling at Neiman-Marcus for $62,500; though the price he paid was quite substantial compared to his income, and even though he was not an expert in diamonds, Clark purchased the jewel without first getting an appraisal and without any title papers; and Clark waited twenty months before trying to sell the diamond. *United States* v. *Jacobs*, 475 F.2d 270, 279-281 (2d Cir.), *cert. denied sub. nom. Lavelle* v. *United States* and *Thaler* v. *United States* 414 U.S. 821 (1973); *United States* v. *Infanti*, 474 F.2d 522, 525 (2d Cir. 1973); *United States* v. *DeKunchak*, 467 F.2d 432, 436 (2d Cir. 1972); *United States* v. *Fistel*, 460 F.2d 157, 163 (2d Cir. 1972); *United States* v. *Marcus*, 429 F.2d 654, 656 (3d Cir. 1970); *United States* v. *Izzi*, 427 F.2d 293, 297 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970); *United States* v. *Owens*, 420 F.2d 305, 306 (2d Cir. 1970); *United States* v. *Anderson*, 406 F.2d 529, 532-535 (8th Cir. 1969).

Certain of the facts which support the inference that the diamond was stolen also support the inference that Clark knew it was stolen.* The jury was entitled to rely on the fact that Clark had given several inconsistent explanations, some under oath in his divorce proceeding, as to how and when he had obtained the diamond, *United States* v. *Lacey*, 459 F.2d 86 (2d Cir. 1972), the effect on these explanations of the testimony of Clark and his wife at trial, *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974); *United States* v. *Hedges*,

---

* Clark argues that the jury was required to "pile inference upon inference" in order to conclude that he knew the diamond was stolen. This argument is not only illogical, it is based on an archaic legal principle that has specifically been rejected by this Circuit. *United States* v. *Brawer*, 482 F.2d 117, 129 (2d Cir. 1973); *United States* v. *Eustace*, 423 F.2d 570, 571 (2d Cir. 1970). Moreover, while some of the facts from which the jury might have inferred the diamond was stolen also support the inference that Clark knew it was stolen, both inferences are separately drawn from facts.

449 F.2d 1290 (9th Cir. 1971),* and perhaps the strongest indicator in the law of a defendant's guilty knowledge: possession of recently stolen property in the absence of "convincing 'circumstances * * * consistent with innocence'." *United States* v. *Brawer, supra,* 482 F.2d at 130. *Accord, Barnes* v. *United States,* 412 U.S. 837 (1972); *United States* v. *Wilson,* 162 U.S. 613 (1896); *United States* v. *Jacobs, supra.* Here, Clark's possession was indeed "recent" within the meaning of that formulation. The diamond was last seen before its mysterious disappearance when exhibited to a potential customer at Neiman-Marcus in Dallas, Texas on May 25, 1972, and it was acquired by Clark, by his own admission, in Cocoa Beach, Florida in "late May, 1972" (Tr. 248). Finally, as the jury was properly instructed, the requirement of knowledge could be established if they found that Clark acted with a reckless disregard for whether the diamond was stolen and with a conscious purpose to avoid learning the truth, unless they found that Clark actually believed the diamond was not stolen (Tr. 490, 509). *United States* v. *Bright,* Dkt. No. 74-2447 (2d Cir., May 21, 1975); *United States* v. *Brawer, supra; United States* v. *Jacobs, supra.*

POINT II

The court properly denied Clark's motion to suppress his statements to the FBI and the diamond itself.

Clark argues that the statements he made to Agent Mitchell on January 11, 1974 and the diamond itself were obtained illegally and should have been suppressed.

---

* At the end of the defense case Judge Carter commented that its effect had been to strengthen the Government's position (Tr. 412).

A. Clark's statements.

The sole basis of Clark's claim that his statement to Agent Mitchell was improperly received is that he was not given a *Miranda* warning.

On January 11, 1974, after Doppelt had identified the diamond which Clark had offered for sale to Duffield as the diamond which was missing from Neiman-Marcus, two agents of the FBI went to Clark's hotel room to interview him (Tr. 141-142). The agents first telephoned Clark from the lobby and asked if they could speak with him. Clark agreed to the interview, and after the agents identified themselves he invited them into his room where the interview proceeded in the presence of Clark's wife (Tr. 142, 155-157). Clark was never detained in any way, and both he and the agents were fully aware that the interview could have been discontinued by him at any time (Tr. 161). In fact, Clark proceeded directly from the interview to Duffield's office, where he demanded the diamond back (Tr. 135, 173). At all times during the interview Clark was cooperative, courteous and polite (Tr. 154, 179-180). This was hardly a custodial or coercive situation requiring that Clark be advised of his Constitutional rights. *Miranda* v. *Arizona*, 384 U.S. 436, 445, 448, 450, 455, 477, 478 n. 46 (1966); *United States ex rel. Sanney* v. *Montange*, 500 F.2d 411, 416 (2d Cir. 1974); *United States* v. *Hall*, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

B. The diamond.

When Duffield learned that the diamond he had received from Clark was missing from Neiman-Marcus, he locked it in his safe deposit box for safekeeping. On January 11, immediately after Clark had completed the interview with the FBI agents, he returned to Duffield's office and demanded that the diamond be returned to him. Duffield,

however, upon advice from the United States Attorney that a search warrant for the safe deposit box was being prepared, refused to give Clark the diamond (Tr. 136). When the warrant arrived, Duffield surrendered the diamond to the FBI (Tr. 137). Clark's shotgun argument is that the diamond was seized without a warrant, the warrant which was obtained was not based on probable cause, and the warrant relied on statements made by Clark which were improperly obtained. None of these arguments merits serious consideration. First, it is clear that the statements which Clark made to the FBI agents were properly obtained (See Point II A, *supra*). Secondly, even a cursory review of the affidavit supporting the search warrant, duly issued after review by a United States Magistrate, and accordingly afforded a strong presumption of regularity, *United States* v. *Canestri*, Dkt. No. 75-1143 (2d Cir., June 30, 1975) slip op. 4509, 4514, reveals that there was probable cause to believe the diamond was stolen. *Jones* v. *United States*, 362 U.S. 257, 269 (1960); *United States* v. *Cangiano*, 491 F.2d 906, 912 (2d Cir. 1974).*

---

* The affidavit for the warrant to search Duffield's safe deposit box, sworn to by FBI agent John Begly on January 11, 1974 asserted the following facts:

> "1. Robert Deevey, Security Supervisor, Neiman-Marcus, Dallas, Texas, told me today that Neiman-Marcus received a diamond ring on consignment from Stanley Doppelt, that it had been in the Neiman-Marcus store in Dallas, that an inventory there in January 1973 revealed that it was missing, and that Neiman-Marcus was in the process of reimbursing Doppelt for the loss.
>
> 2. Gordon Duffield, of L. Bergman & Company, jewelers located at 630 Fifth Avenue, New York, New York, told me that on January 10, 1974, Frank Clark III gave him the diamond ring described above for appraisal, and that he then showed it to Doppelt for the appraisal.
>
> 3. Doppelt, who is a diamond cutter, told me that the ring was worth $75,000, that he was positive that this ring had been originally cut by him and that it was the same

[Footnote continued on following page]

Finally, the argument that the diamond was seized without a warrant confuses the difference between a seizure and a justified detention while a search warrant is obtained. Here, once probable cause had been shown to believe that the safe deposit box contained the fruits of a crime, the favored practice was followed of securing the box until a search warrant could be obtained. The procedure which was followed was clearly reasonable under the circumstances. *United States* v. *Van Leeuwen,* 397 U.S. 249 (1970); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 472 (1971).

---

ring that he had sent to Neiman-Marcus and that had been found to be missing. According to Doppelt, Neiman-Marcus' records showed that the ring was transferred from Neiman-Marcus' store in Bal Harbour, Florida to its Dallas store on May 8, 1972.

4. Frank Clark III made a statement today to Special Agents P. F. Mitchel, Jr. and John H. Gera. Clark said that he bought the ring in May or June of 1972 in Cocoa Beach, Florida from William R. Turner for $20,000 ($15,000 in cash and $5,000 in the form of forgiveness of two debts). He said that Turner died in October 1972. He said that he never saw any documents showing title to the ring. He said it was his opinion that Turner had won the ring by gambling, but said that he never asked Turner where he got it. Clark also said he was a member of the Florida bar and had defended numerous criminal cases. Clark admitted he transported the ring from Vermont to New York.

5. Duffield is keeping the ring in L. Bergman's safe deposit box, described above."

POINT III

The charge of the court was entirely proper.

Clark contends that the court committed plain error in a number of respects during its final instructions to the jury.* Each of these contentions is entirely without merit.

A. The *Allen* charge.

After the jury twice indicated it was deadlocked, and with Clark's consent, Judge Carter gave a modified *Allen* charge in a form that has been repeatedly approved in this Circuit (Tr. 497-504). See, *e.g., United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 419 U.S. 895

---

* Clark seeks to invoke Rule 52(b), Fed. R. Crim. P., since he did not object at trial to those portions of the charge he now claims are erroneous. At the end of the initial charge Clark said: "I don't feel I have any objections to the charge" (Tr. 496). After the *Allen* charge was given Clark said: "No objection, your Honor" (Tr. 504). When the Court determined, in response to a note from the jury, to repeat the charge on the elements of proof, Clark's only objection was to a repetition of the stipulation that he had transported the diamond from Vermont to New York and that it was valued at more than $5,000 (Tr. 505-506). As a general proposition, "The failure of a defendant to request charges omitted or to take exception to the charge as given normally precludes any claim of error, although an appellate court may reverse for errors not called to the attention of the trial judge if they are such as affect substantial rights." *United States* v. *Private Brands, Inc.*, 250 F.2d 554, 557 (2d Cir. 1958). *Accord, United States* v. *Barry*, Dkt. No. 75-1060 (2d Cir. June 18, 1975) slip op. 4117, 4122. With respect to the *Allen* charge, Judge Weinfeld commented in *United States* v. *Bowles* 428 F.2d 592, 596-597, n. 3 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970): "The failure to raise any objection to the supplemental charge below would itself be a sufficient ground for rejecting appellant's claim of error in this court. [Citing *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); Fed. R. Crim. P. 30; *see United States* v. *Hynes*, 424 F.2d 754, 757-758 (2d Cir. 1970).]"

(1974); *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973); *United States* v. *Domenech*, 476 F.2d 1229, 1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973); *United States* v. *Bowles*, *supra*, 428 F.2d 594, 595 n. 9.

The trial court did not ask the jurors to abandon their views nor order them to reach a verdict. Rather, the court merely emphasized that a verdict is in the best interests of both prosecution and defense, while specifically and repeatedly urging the jurors not to abandon their individual conscience in order to achieve unanimity. This instruction was proper in every respect.

B. Elements of the offense.

Clark contends that the trial court committed various errors in instructing the jury as to two of the elements of the crime charged, *i.e.*, that the diamond was stolen and that he knew it was stolen. This contention is frivolous. The court's charge carefully detailed the necessary elements of proof in a manner that was entirely fair and proper (Tr. 487-492, 507-511). The suggestion that Clark was prejudiced because the jury was instructed that they could draw inferences from the evidence or because the court explained how the jury should evaluate whether Clark's behaviour amounted to a reckless disregard for whether the diamond was stolen, simply ignores the law (See Point I, *supra*). Clark did not object to these instructions below.

C. The stipulation.

Clark's final complaint with respect to the charge is that it was error for the court to remind the jury that two of the elements of the crime had been agreed to. After the jury had sent in a note indicating it was deadlocked, and after the *Allen* charge had been given, a note was sent in asking for "legal advice on a certain matter

because it is not clear in the mind of a juror that he knowingly brought stolen goods into New York" (Tr. 504). In response to this note the court reiterated its charge on the elements of theft and knowledge, and over Clark's objection reminded the jury of the stipulation as to value and interstate transportation (Tr. 506). It is difficult to perceive how Clark might even possibly have been prejudiced by this reminder.

POINT IV

The indictment was sufficient.

Clark argues that the indictment failed to charge that the diamond ring was stolen and accordingly was fatally defective.* The indictment, which tracked the language of Section 2314 of Title 18, United States Code, charged:

> "On or about the 9th day of January, 1974, in the Southern District of New York, FRANK CLARK III, the defendant, unlawfully, wilfully and knowingly did transport in interstate commerce, to wit, from West Dover, Vermont to New York, New York certain goods of the value of $5000 or more, to wit, a diamond weighing approximately 8.04 carats and set in a platinum ring, *knowing the same to have been stolen, converted and taken by fraud.*" (emphasis added).

It is clear from reading the indictment that the general test, *i.e.*, whether the indictment contains sufficient information to enable the defendant to prepare his defense and to plead the judgment as a bar to further proceedings, was met.

---

* Curiously, Clark made the same argument in a motion filed in the trial court, there conceding that the indictment was sufficient under what he termed the "general law", but suggesting without offering any legal support that in this case the "general law" should not apply.

Rule 7(c), *Federal Rules of Criminal Procedure; Hagner* v. *United States*, 285 U.S. 427, 431 (1932); *United States* v. *Cohen*, Dkt. No. 74-2026 (2d Cir. June 26, 1975), slip. op. 4405, 4415; *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Spada*, 331 F.2d 995 (2d Cir.), *cert. denied*, 379 U.S. 865 (1964). If the indictment in this case does not specifically describe the diamond as a stolen diamond, the unmistakeable presumption dictated by common sense and plain English is that it was stolen. *Hagner* v. *United States*, *supra*. Moreover, the precise language of this indictment has been upheld as sufficient. *Johnson* v. *United States*, 207 F.2d 314, 318-319 (5th Cir.), *cert. denied*, 347 U.S. 938 (1953).

POINT V

No error was committed in the Government's opening remarks to the jury.

Clark claims that he was so prejudiced by the Government's opening remarks to the jury that he was deprived of a fair trial. In spite of the fact that at the trial below Clark objected only to the prosecutor's statement that he was confident the jury would return a verdict of guilty (Tr. 49), Clark now contends that multiple errors were committed.* Among the remarks Clark argues are unfair are the prosecutor's suggestion that the case would be proved "beyond any doubt, not just beyond a reasonable doubt" (Tr. 43), that the case "is important to the Government and it is of course important to the defendant" (Tr. 40), the characterization that only by a "queer twist of fate" did Doppelt, the original cutter, chance to see the diamond and identify it as the one which was missing from Neiman-Marcus (Tr. 45), the assertion that Clark gave inconsistent versions of where he got the diamond (Tr. 47), and the

* The Court denied Clark's motion to strike the single sentence he objected to (Tr. 50).

comment that it would be the jury's job to decide if Clark was innocent or had guilty knowledge that he was dealing with stolen merchandise (Tr. 49).

For the most part, the remarks are strictly within the purpose of an opening: to give the broad outlines of the case in terms of the charges and the anticipated proof. See, *e.g., United States* v. *Somers,* 496 F.2d 723 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974); *United States* v. *Rothman,* 463 F.2d 488 (2d Cir.), *cert. denied,* 409 U.S. 956 (1972). Without specifically answering each of Clark's contentions, it is abundantly clear that none of these remarks was so improper as to require a new trial, especially in the absence of any objection or request for a curative instruction and in light of the neutralizing remarks made by both the prosecutor and the Court.*

---

* In both his opening and closing remarks the prosecutor reminded the jury that nothing said by him, defense counsel, or the Court could be considered as evidence (Tr. 41, 453-454). The Court specifically outlined the purpose of the opening statements in its preliminary instructions (Tr. 36), and in its final instructions repeated the warning that statements by counsel are not evidence, making the thought especially clear to correct any possible confusion flowing from Clark's dual role as both defendant and attorney (Tr. 477-478). These instructions were ones that the jury could understand and follow and it should be presumed it did so. See, *United States* v. *Sparano,* 422 F.2d 1095, 1099 (2d Cir. 1970).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT B. HEMLEY,
FREDERICK T. DAVIS,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—350—536

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT B. HEMLEY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of JULY, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

HOWARD F. CERNY, ESQ.
345 PARK AVENUE
NEW YORK, NEW YORK 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert B. Hemley

ROBERT B. HEMLEY

Sworn to before me this

16th day of JULY, 1975

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977